FILED
JUL 29 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

IMMANUEL GRINN,

Petitioner,

v.

VILLAGE OF NORTH PALM BEACH, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals, for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Rhea P. Grossman
RHEA P. GROSSMAN, P.A.
Counsel for Respondents,
VILLAGE OF NORTH PALM BEACH, et al.
2780 Douglas Road,
Suite #300
Miami, Florida 33133-2749
(305) 448-6692

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDINGS . . . i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

REPLY TO STATEMENT OF CASE 1

ARGUMENT

I. **NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED BY THE PETITION** 6

II. **THE DISMISSAL OF PETITIONER'S COMPLAINT WITH PREJUDICE DID NOT DENY PETITIONER DUE PROCESS** 10

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Adkinson v. The Municipal Recall Committee of June 7, 1985, 488 So.2d 621 (Fla. 1st DCA 1986).. 16

Bank v. Pitt, 928 F.2d 1108 (11th Cir. 1991) .. 11

Bennett v. Parker, 898 F.2d 1530 (11th Cir. 1990) ... 22

Buckner v. Lower Florida Keys Hospital Dist., 403 So.2d 1025 (Fla. 3rd DCA 1981).. 24

Collins v. City of Harker Heights, 403 U.S. 115 (1992) 17,19

Conley v. Gibson, 355 U.S. 41 (1957) 11

County of Oklahoma v. Tuttle, 471 U.S. 808(1985) 18, 20

Depew v. City of St. Mary's Georgia, 787 F.2d 1496 (11th Cir. 1986).....17,20

Fernandez v. United States, 941 F.2d 1488 (11th Cir. 1991) 9

Guthry v. Florida Power and Light, 460 So.2d 1032 (Fla 3rd DCA 1985).... 25

Harper v. Thomas, 988 F.2d 101(11th Cir. 1993)..... 9

Libertarian Party of Florida v. State of Florida, 710 F.2d 790 (11th Cir. 1983)..... 15

Loeb v. Geronemus, 66 So.2d 241(Fla. 1953)..... 24

Mitchell v. Forsyth, 472 U.S. 511 (1985) 22

Monell v. Department of Social Services of New York, 436 U.S. 658, 694 (1978) 17,19

Orlando Sports Stadium, Inc. v. Sentinel Star Co., 316 So.2d 607(Fla. 4th DCA 1975)...23

Patula Elec. Membership Corp. v. Whitworth, 951 F.2d 1238(11th Cir.)..... 9

Post v. City of Ft. Lauderdale, 7 F.3d 1552 (11th Cir. 1993)... 21

Shidlowsky v. National Car Rental Systems, Inc., 344 So.2d 903 (Fla. 3rd DCA 1977)..24

State v. Brown, 298 So.2d 487 (Fla. 4th DCA 1974)..12

Trushin v. State, 384 So.2d 668 (Fla. 3rd DCA 1980)..13

Veltmann v. Walpole Pharmacy, Inc., 928 F.Supp. 1161 (M.D.Fla. 1996).. 20

Westwood Lake, Inc. v. Dade County,
264 So.2d 7 (Fla. 1972) 13

Weissman v. K-Mart Corp.,
396 So.2d 1164 24

Other Authorities:

Federal Rule of Civil Procedure
12(b)(b) 22

Florida Statutes §104.185 ...11,12,17,24

28 U.S.C. §1254 6

28 U.S.C. §636 7

Rule 7.1.B, General Rules
of the United States
District Court, Southern District
of Florida 8

Supreme Court Rule 10 ..... 6, 10

Op.Atty.Gen., 064-3,
January 15, 1964 12

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

This appeal is from the decision of the United States Court of Appeals for the Eleventh Circuit in *Grinn v. Village of North Palm Beach, et al.*, an unpublished opinion dated January 29, 1998, Case No. 97-5044 (App.A-1)and an order denying the petition for rehearing dated April 15, 1998 (App.B-2). The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case.

REPLY TO STATEMENT OF THE CASE

The Respondents submit the following Reply to Statement of the Case to present

to the Court the areas of disagreement with the statement submitted by Petitioner, and to supply important information that has been omitted.

Petitioner's complaint was not as complicated as he would have this Court believe. Petitioner, in the District Court, was seeking redress for an alleged constitutional wrong, i.e., that the Respondent VILLAGE OF NORTH PALM BEACH refused to validate a citizen's petition to repeal an ordinance passed by the Village council. In his complaint (App.J-1), the Petitioner sought:

(1) to declare *Florida Statutes §104.185* unconstitutional, on its face or as applied to the Petitioner;

(2) to declare *Article III, Section 10 of the Village Charter* unconstitutional as applied to the Petitioner;

(3) to determine that the individual Respondents, in both their official and individual capacities violated Petitioner's civil rights; and

(4) to determine that the individual respondents, in both their official and individual capacities maliciously prosecuted the Plaintiff.

According to the allegations in the complaint, the Petitioner alleged that

1. The VILLAGE OF NORTH PALM BEACH and its employees deprived the Petitioner of his right to petition the government for redress regarding an ordinance passed on July 17, 1995, known as Ordinance No. 22-95.

2. Petitioner claimed that on August 16, 1995, he presented signed signature sheets in accordance with Section III, Article 10 of the Village Charter for filing a petition for a referendum on

Ordinance No. 22-95. The **Village Clerk refused the signature sheets because the requisite number of signatures was missing.**

3. On that same day, ten minutes before the deadline for filing, Petitioner returned with the required signature sheets, however, the **Clerk again refused to accept the signature sheets as a petition because there were multiple signatures of the Petitioner.** Petitioner notified the Village council on August 24, 1995, that the Clerk violated his rights.

4. The Petitioner learned that on August 24, 1995, Respondent O'MEILIA filed charges against Petitioner for violation of *Florida Statutes §104.185*. The charges were eventually dismissed.

Respondents filed a motion to dismiss the complaint. The District Court referred the matter to the Magistrate

Judge. Contrary to the assertions of the Petitioner, the Magistrate Judge did not rule on the motion to dismiss but merely prepared and filed a report and recommendation (App.D-1).

At no time did the Petitioner object to the jurisdiction of the Magistrate Judge.

The District Judge reviewed the Report and Recommendation of the Magistrate Judge and issued an Order granting the motion to dismiss and dismissing the complaint with prejudice (App.C-2).

On appeal to the Eleventh Circuit, the Petitioner never raised the procedural issues that he now brings to this Court. The Eleventh Circuit considered the District Court's order, *de novo,* and rendered an unpublished opinion affirming the dismissal (App.A-1).

ARGUMENT

I.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED BY THE PETITION

A review on writ of certiorari is not a matter of right, but of judicial discretion. *28 U.S.C. §1254* provides that "[c]ases in the courts of appeals **may** be reviewed by the Supreme Court..." *Supreme Court Rule 10* specifically notes that 'Review on a writ of certiorari is not a matter of right, but of judicial discretion."

The Petitioner set out four (4) questions he is presenting to this Court. However, in actuality, the sole issue is whether his procedural due process was violated because the District Court granted Respondent's Motion to Dismiss with Prejudice and without leave to

amend. A peripheral issue seems to be that the District Court and the Eleventh Circuit used the wrong standard for evaluating his complaint, that is, the need for "heightened pleading" in civil rights matters.

First, the District Judge, pursuant to *28 U.S.C. §636,* exercised its discretionary jurisdiction to appoint a magistrate to hear and determine pretrial matters. The Magistrate Judge did not rule on the motion to dismiss which was based on a failure of the Petitioner to state a claim upon which relief can be granted. The Magistrate Judge merely filed a Report and Recommendation (App.D-1). The District Judge reviewed the file, record and Report and entered its own order dismissing the complaint (App.C-2). The Petitioner had ample opportunity to present all relevant information and exhibits prior to the

rulings of the Court and recommendations of the Magistrate. Nothing in this procedure is violative of the Rules of Procedure or local rules governing the practice before the District Court, Southern District of Florida.

There is nothing to indicate that oral argument on these pretrial matters would have produced any different result. In fact, had Petitioner wanted or desired oral argument, *Rule 7.1 B, General Rules of the United States District Court, Southern District of Florida*, provides a procedure for oral argument of which the Petitioner did not avail himself.

The Eleventh Circuit reviewed the record, *de novo*, and issued an opinion which stated (App.A-3):

> This Court review *de novo* the dismissal of a complaint for failure to state a claim, accepting all allegations in the

> complaint as true and construing facts in a light most favorable to the plaintiff. *Harper v. Thomas*, 988 F.2d 101, 103 (11th Cir. 1993). A complaint may not be so dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Patula Elec. Membership Corp. V. Whitworth*, 951 F.2d 1238, 1240 (11th Cir.), *cert. denied*, 506 U.S. 907 (1992) (citations omitted). In a *pro se* action, a court should construe a complaint more liberally than it would pleadings drafted by lawyers. *Fernandez v. United States*, 941 F.2d 1488, 1491 (11th Cir. 1991).

The Eleventh Circuit's unpublished decision negates the Petitioner's claim that the wrong standard[1]/ was applied in evaluating the sufficiency of the complaint and granting the Respondent's motion to dismiss since the Eleventh

---

[1]/ Respondents do not concede that the District Court used the wrong standard, and in fact, as the argument will show, the correct standard was used both by the District Court and the Eleventh Circuit.

Circuit construed Petitioner's complaint "liberally" when reviewing the District Court's order *de novo*.

The Eleventh Circuit's unpublished opinion is not in conflict with any decision of another United States court of appeals; does not decide an important federal question that conflicts with a decision by a state court and the decision does not depart from the accepted and usual course of judicial proceedings. The petition should be denied. *Supreme Court Rule 10.*

II.

THE DISMISSAL OF PETITIONER'S COMPLAINT WITH PREJUDICE DID NOT DENY PETITIONER DUE PROCESS

Petitioners' argument is centered around his allegations that he was not given an opportunity to amend his complaint and that the District Court used

a "heightened standard" test in determining the sufficiency of his complaint when granting the Respondents' motion to dismiss. These allegations are without merit.

Amendments to complaints are not required if a plaintiff indicates that he does not wish to amend or if a more carefully drafted complaint could not state a claim under the standard of *Conley v. Gibson*, 355 U.S. 41 (1957). *Bank v. Pitt*, 928 F.2d 1108 (11th Cir. 1991).

In this case the Petitioner could not state a claim no matter how he tried to amend his complaint.

In Count I, GRINN challenges *Florida Statute §104.185*, which provides:

> It is unlawful for any person knowingly to sign a petition or petitions for a particular issue or candidate more than one

> time. Any person violating the provisions of this section shall, upon conviction, be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

This statute is part of *Chapter 104, Florida Statutes* and is referred as the *Corrupt Practices Act*, which Act is applicable to all elections in the State of Florida, including municipal elections. *State v. Brown*, 298 So.2d 487 (Fla. 4th DCA 1974); *Op.Atty.Gen.*, 064-3, January 15, 1964.

Florida Statute §104.185 is neither facially unconstitutional nor was it applied to the Plaintiff in an unconstitutional manner as determined by the Magistrate. In fact, the Magistrate specifically found that the statute is neither vague, unclear nor overly broad, and should be given a construction which preserves its

constitutionality, relying upon *Trushin v. State*, 384 So.2d. 668 (Fla. 3rd DCA 1980), *aff'd*, 425 So.2d 1126 (Fla. 1982).

The statute certainly has not been arbitrarily applied to GRINN, especially in light of GRINN'S own admission in his complaint that there were "multiple signatures of the Plaintiff on the signature sheets". *Compare, Westwood Lake, Inc. v. Dade County*, 264 So.2d 7 (Fla. 1972). **The Magistrate concluded that GRINN "should not be permitted to hide his blatant wrongdoing behind empty allegations of constitutional wrongdoing and, therefore, his first count should be dismissed for failure to state a claim".**[emphasis added]

Count II of the complaint is similarly lacking of any legal or factual merit. GRINN'S claim regarding the Village Charter is merely that the

specific charter provision is unconstitutional as it applies to him. GRINN claims that the action of the Village Clerk by not accepting the signature sheets was "manifestly violative of letter and spirit of Article III, Section 10 as well as past Village practices and precedent in its application. However, as noted by the Magistrate, nowhere does GRINN explain the past Village practices and precedent. GRINN admits that he did not have the appropriate signatures when he first attempted to file the petition and admits that his signature appeared on various sheets in order to conform with the lack of the required number of signatures when he again attempted to file the petition. So, too, GRINN admits that the Village Clerk did not accept the petition because there were too few signatures.

The Village Charter makes it mandatory that the petition be signed by qualified voters of the Village equal in number to at least fifteen percent[2]/ of the total number of qualified voters registered to vote at the last regular Village election. GRINN does not set forth any allegation that he had the "required signatures" only that he was not given a chance to supplement the signatures after the petition was "certified insufficient" under the provisions of the Village Charter. The procedure outlined in the Village charter and followed by the Village clerk is constitutional and there are no facts in GRINN'S complaint that

---

[2]/ There is no equal protection violation as it relates to initiative petitions and the required or necessary signatures of registered voters. *Cf. Libertarian Party of Florida v. State of Florida,* 710 F.2d 790 (11th Cir. 1983), *cert. denied* 105 S.Ct. 117.

show this charter provision was applied unconstitutionally. GRINN simply did not have the required number of signatures (without verification) to file the petition initially. *Compare, Adkinson v. The Municipal Recall Committee of June 7, 1985*, 488 So.2d 621 (Fla. 1st DCA 1986).

The Magistrate, in recommending that Count II of the complaint was insufficient on its face and should be dismissed, stated that "**Grinn apparently believes the Court should fashion a system which would permit one solitary person to meet procedural filing requirements by merely signing his own name over and over again**" [emphasis added].

GRINN'S claim in Count III of his complaint is against the VILLAGE and the individual defendants/appellees in their official and personal capacities for

intentionally depriving him of his constitutional rights by refusing to accept his proffered signature pages for the petition and by conspiring to arrest him for violating *Florida Statute §104.185.*

In order to hold the Village (and its employees in their official capacities) liable under *§1983*, GRINN had to establish facts that would show that his injuries were inflicted by the Village's employees as a result of a policy or custom of the Village which policy or custom was the "moving force" behind the constitutional injury. *Collins v. City of Harker Heights*, 503 U.S. 115, 121-122 (1992); *Monell v. Department of Social Services of New York*, 436 U.S. 658, 694 (1978). "Section 1983 provides a fault-based analysis for imposing municipal liability." *Depew v. City of St. Mary's Georgia*, 787 F.2d 1496, 1499 (11th Cir. 1986). Therefore, even if

the plaintiff is able to establish that the municipality had a custom or policy, in order to hold the municipality liable under §1983, the plaintiff must also establish that the custom or policy caused the subject deprivation. *Id.* In order "[t]o establish a policy or custom, it is generally necessary to show a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality. Normally random acts or isolated incidents are insufficient to establish a custom of policy." *Id.*. Proof of a single incident of unconstitutional activity generally is not sufficient to impose liability on a municipality under §1983 unless the policy or custom is itself unconstitutional. *County of Oklahoma v. Tuttle*, 471 U.S. 808, 823-824 (1985).

The Magistrate correctly determined that:

> The nine (almost uniformly one-sentence-long) paragraphs which make up count III are a stew of legal adjectives and conclusory allegations which utterly fail to provide any guidance, let alone a clear statement of the facts upon which plaintiff relies; the only factual allegations are that Defendant K. Kelly (the Village Clerk) did not accept the petitions and that Defendant O'Meilia filed charges against him. While the Court is certain that these two defendants are immunized from suit for their actions [footnote omitted], that analysis is unnecessary since Plaintiff has utterly failed to provide any facts which establish that his (alleged) injuries were inflicted by the village's employees as a result of a policy or custom which was the "moving force" behind the constitutional injury. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 121-22 (1992); *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978). Here, Plaintiff cannot show even a single isolated policy or custom of the Village or its employees that is itself unconstitutional; let alone make

> the requisite showing of a persistent and widespread practice that is violative of his or other's civil rights. *See County of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) and *Depew v. City of St. Marys, Georgia*, 787 F.2d 1496, 1499 (11th Cir. 1986). Furthermore, **Plaintiff cannot succeed in arguing bad faith on the part of the Clerk in not accepting his proffered petition since it clearly violated Florida law (not to mention the common sense notion that one can't sign a petition more than once).** [emphasis added]

The claims against the individual defendants, in their individual capacities, cannot stand no matter how many times the Petitioner sought to amend his complaint. There is no clear statement of grounds on which GRINN relies other than KATHLEEN F. KELLY, as Village Clerk, did not accept the petitions and Respondent CHARLES R. O'MEILIA, "filed charges against [Petitioner]". *See Veltmann v. Walpole Pharmacy, Inc.*, 928 F.Supp 1161

(M.D.Fla. 1996). And, as to these two individuals, O'MEILIA and KELLY, the complaint clearly indicates that they are entitled to a dismissal on the basis of their qualified immunity which the Magistrate acknowledged but did not specifically rule upon. The individual Respondents are qualifiedly immune from not only liability, but from suit itself. Specifically, and under Federal Law, qualified immunity protects a governmental official performing discretionary functions from civil liability if their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known. *Post v. City of Fort Lauderdale*, 7 F.3d 1552 (11th Cir. 1993). The defense of qualified immunity is a legal defense which may be raised on a pretrial motion

to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. *Bennett v. Parker*, 898 F.2d 1530, 1535 n.2 (11th Cir. 1990). Qualified immunity is not an "affirmative defense". Qualified immunity is a bar from litigation. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). When a suit is barred by the doctrine of qualified immunity on the face of the pleading, and no offer of evidence to the contrary would be available to a plaintiff, a motion to dismiss is the proper vehicle to dispose of the litigation. *Bennett v. Parker*, 898 F.2d 1530, 1535 n.2 (11th Cir. 1990). No amount of amendments would give the Petitioner a cause of action against these individual Respondents. The District Court correctly dismissed Count III with prejudice.

As to Count IV, GRINN attempted to

set forth a cause of action against all of the Respondents on the basis of "conspiracy". In order to make sense of his allegations, it is necessary to interpret this count as claim for damages arising out of a conspiracy to maliciously prosecute GRINN, which the Magistrate did.

There is no cause of action for "conspiracy". As noted in *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So.2d 607, 609 (Fla. 4th DCA 1975), "[t]he gist of a civil action for conspiracy is not the conspiracy itself but the civil wrong which is alleged to have been done pursuant to the conspiracy. Therefore, whether the complaint involved in this appeal alleges facts sufficient to state a cause of action must be determined from the standpoint of whether the complaint states a cause of action in * * *

libel", quoting from *Loeb v. Geronemus*, 66 So.2d 241, 243 (Fla. 1953). *See also Buckner v. Lower Florida Keys Hospital Dist.*, 403 So.2d 1025 (Fla. 3rd DCA 1981). In the present case, GRINN must set orth a cause of action for malicious prosecution. Of the six elements required to be plead, *Weissman v. K-Mart Corp.*, 396 So.2d 1164, 1167 (Fla. 3rd DCA 1981); *Shidlowsky v. National Car Rental Systems, Inc.*, 344 So.2d 903 (Fla. 3d DCA 1977), *cert. denied*, 355 So.2d 516 (Fla. 1978), the petitioner cannot, regardless of how many times he amends, set forth the element of lack of probable cause. As the Magistrate pointed out, GRINN admitted his own violation of *F.S. §104.'85.* That alone is sufficient to defeat such a cause of action. Further, the intervening acts of a prosecutor break the chain of causation

unless the plaintiff can show that these intervening acts were the result of deception or undue pressure by the defendants. *Guthry v. Florida Power and Light*, 460 So.2d 1032 (Fla. 3rd DCA 1985). The Magistrate's Report and Recommendation was legally and procedurally correct and the District Court did not err in adopting the Report and ordering the complaint dismissed with prejudice. The Eleventh Circuit reviewed the record *de novo* and found that the Petitioner could not prove any facts that would entitled him to relief. There is no basis for allowing Petitioner to amend his complaint and no basis to find that Petitioner's procedural due process rights were violated because he had no oral argument on the motion to dismiss or that an "improper standard" was applied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RHEA P. GROSSMAN
RHEA P. GROSSMAN, P.A.
Counsel for Respondents,
VILLAGE OF NORTH PALM BEACH, et al.
2780 Douglas Road,
Suite #300
Miami, Florida 33133-2749
(305) 448-6692